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## Finnish Report on Individual Liability for Business Involvement in International Crimes

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# FINNISH REPORT ON INDIVIDUAL LIABILITY FOR BUSINESS INVOLVEMENT IN INTERNATIONAL CRIMES

Raimo Lahti\*

## 1. Foreword

In Finnish legal history, there has been no case concerning the individual liability for business involvement in international crimes. Actually, so far, only one case on the individual liability for an international crime (in *sensu stricto*, 'core crimes') has been adjudicated in criminal proceedings in Finland, namely Prosecutor vs. Francois Bazaramba, in which the accused Rwandan citizen was sentenced for genocide committed in Rwanda<sup>1</sup>.

Neither has there been much public or scientific discussion on the liability for business involvement in international crimes. However, on assignment by the Ministry of Foreign Affairs, a research project on the relationship between business and corporate activities and human rights was carried out by the Erik Castrén Institute of International Law and Human Rights in the University of Helsinki in 2008<sup>2</sup>. It relied heavily on John Ruggie's report on the subject for the United Nations (UN)<sup>3</sup>. The research report ends with a number of recommendations particularly directed at the Finnish Government and at various public authorities. The recommendations called for a more active role of the government authorities towards the issue of human rights in order to assist Finnish corporations to become more responsible actors.

## 2. General Remarks on the Regulation of International Crimes in Finnish Criminal Law

The international crimes ('core crimes') defined in the Rome Statute of the International Criminal Court (ICC Statute) were implemented into the Finnish Criminal Code (CC)<sup>4</sup> in 2008. These provisions in *Chapter 11 of the Criminal Code* cover genocide, crimes against humanity and war crimes in line with the ICC Statute, but their definitions are not identical. For instance, the Finnish interpretation of the legality principle and its sub-principle *lex certa* prevented the use of such an open phrase as 'other inhumane acts...' in the definition of crimes against humanity (cf. Article 7, Sub-paragraph 1.k in the ICC Statute).

*Chapter 11 of the Criminal Code* also includes, amongst others, provisions on aggression (Section 4a, as added into the Code by Act No. 1718/2015) and on torture (Section 9a, as added by Act No. 990/2009).

The general doctrines of the Criminal Code, as amended by Act No. 515/2003 in *Chapters 3–5 of the Code*, are also applicable as such to international crimes. However, there are special provisions in *Sections 12–14 of*

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<sup>1</sup> See M Kimpimäki, 'Genocide in Rwanda – Is It Really Finland's Concern?' (2011) 11 International Criminal Law Review 155. Kimpimäki deals with the case as it was decided by the Eastern Uusimaa District Court ('Itä-Uudenmaan käräjäoikeus'), on 11 June 2010. That decision was essentially upheld by the *Helsinki Court of Appeals, Judgement No 882, 30 March 2012* (R 10/2555). An unofficial French translation of the judgement is available from the Court of Appeals (helsinki.ho@oikeus.fi).

<sup>2</sup> See M Pentikäinen, *Yritystoiminta ja ihmisoikeudet* [Business Activity and Human Rights] (Research reports, Erik Castrén Institute of International Law and Human Rights, Helsinki 2009).

<sup>3</sup> UNHCR, 'Protect, Respect and Remedy: A Framework for Business and Human Rights. Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie' (7 April 2008) UN Doc A/HRC/8/5.

<sup>4</sup> The Criminal Code was originally enacted in 1889, but it was thoroughly revised during 1990–2003 (as part of the total reform of the Criminal Code) and fragmentarily later. The Chapter 11 (War crimes and crimes against humanity) was amended by the Act No 212/2008. An unofficial English translation of the Criminal Code, as it was in force in 2015, is available at the website of the Finnish Ministry of Justice <<http://www.finlex.fi/fi/laki/kaannokset/1889/en18890039.pdf>> accessed 15 December 2017.

Chapter 11 of the Criminal Code on the responsibility of commanders and other superiors, as well as on the superior orders, which correspond to Articles 28 and 33 in the ICC Statute.

### 3. Individual Modes of Responsibility and Corporate Liability in Finnish Criminal Law

#### 3.1 Basic Forms of Criminal Responsibility

Chapter 5 of the Finnish Criminal Code (Act No. 515/2003) includes provisions on attempt and complicity (see below). The *complicity provisions* follow substantially the model of the German Criminal Code. In the recodification of the Finnish criminal law in 1990–2003, the complicity provisions were mainly retained such as they had been in force since the enactment of the Criminal Code in 1889.

The Finnish provisions (CC 5:3–7) *differentiate* between principals and co-perpetrators, on the one hand, and inciters (instigators) and accomplices (abettors), on the other. This differentiated model of participation is in line with the emphasis on the *expressive or symbolic function of criminal law*. This kind of punishment theory is strongly supported in the Finnish and Scandinavian criminal policy. The authoritative disapproval expressed by criminal law should be differentiated according to the various roles of the participants.

The indirect principal (commission of an offence through an agent) is also one type of perpetrator, and thus a new clarifying provision (CC 5:4) was added into the Code in 2003 concerning the indirect principal. The system of so-called ‘borrowed criminality’ (*Akzessoritätsprinzip*) is applied in the participation doctrine; *i.e.*, in both types of participation, instigation and abetting, the liability is of accessorial or derivative nature.

Sections 3–8 in Chapter 5 of the Criminal Code apply to two or more individuals acting in concert in the commission of the offence. The provisions in CC 5:3–6 define the different forms of participation:

- CC 5:3 on *co-perpetration*: If two or more persons have committed an intentional offence together, each is punishable as an offender. The term ‘committed’ has been interpreted extensively in the juridical practice. The legal literature has recommended the application of the German doctrine of ‘control over crime’ (*Tatherrschaft*) in drawing the line between co-perpetration and accomplice.<sup>5</sup>

- CC 5:4 on the commission of an offence through an agent, *i.e.*, an *indirect principal* (*mittelbare Täterschaft*): A person is sentenced as an indirect principal if he has committed an intentional offence by using, as an agent, another person who cannot be punished for the said offence due to the lack of criminal responsibility or intention or due to another reason connected with the conditions for criminal liability. It should be noted that if the immediate actor fulfils the conditions of criminal responsibility and is thus punishable for the offence, the concept of indirect principal and CC 5:4 are not applicable, in contrast to many other legal orders (such as the German Criminal Code). This fact does not exclude that such a commission of an offence through an agent could trigger a perpetrator’s responsibility (by interpreting ‘commission’ extensively).

In the only Finnish case on an international crime so far, the district court convicted the accused Francois Bazaramba of genocide as a perpetrator, when he had, *inter alia.*, ordered the murders of four persons on different occasions and taken part in the attacks against Tutsis in one place and been one of the leaders of the attacks against Tutsis in another place.<sup>6</sup> In the reasoning, I see similarities with the ‘integral part’ doctrine as an expanded form of commission, such as it has been developed in the practice of the International Criminal Tribunal for Rwanda.<sup>7</sup>

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<sup>5</sup> See D Frände, *Yleinen rikosoikeus* [General criminal law] (Edita 2012) 245–46.

<sup>6</sup> See Kimpimäki (n 1) 155, 157.

<sup>7</sup> See eg R Lahti, ‘Commentary on the Judgement and Sentence *Prosecutor v. Munyakazi*, Case No ICTR-97-36-A, 28 September 2011’ in A Klip and S Freeland (eds), *Annotated Leading Cases of International Criminal Tribunals* (Vol LIII, Intersentia 2018) (in print).

– CC 5:5 on *instigation*: A person who intentionally persuades another person to commit an intentional offence or to make a punishable attempt at such an act is punishable for incitement of the offence as if he was the offender.

– CC 5:6 on *aiding and abetting (accomplice)*: A person who, before or during the commission of an offence, intentionally furthers the commission by another of an intentional act or of its punishable attempt, through advice, action or otherwise, shall be sentenced for abetting on the basis of the same legal provision as the offender. The sentence is determined in accordance with a mitigated (-> ¾) penal scale.

According to the legislative drafts and precedents of the Supreme Court (KKO 2009:87 and KKO 2015:10 concerning aiding and abetting fraud or dishonesty by a debtor, respectively), an active act or omission by the accomplice does not need to be a necessary precondition for the consequence; furthering the probability of the commission of the offence is enough. Nor is a special intent or specific direction required; the applicable lowest level of intention is defined in the general provision on intention (CC 3:6) by using a probability assessment.<sup>8</sup>

– Incitement to punishable aiding and abetting is punishable as aiding and abetting.

### 3.2 The Mode of Corporate Criminal Liability

*Corporate criminal liability* was introduced by the enactment of Chapter 9 of the Criminal Code (Act. No. 743/1995).<sup>9</sup> This form of liability is applicable to a corporation, foundation or other legal entity in the operations of which an offence has been committed if such a liability has been specifically provided in the Criminal Code for the offence. The offence is deemed to have been committed in the operations of a corporation if the perpetrator has acted on behalf or for the benefit of the corporation and belongs to its management or is in a service or employment relationship with it or has acted on assignment by a representative of the corporation. An additional prerequisite is that the perpetrator has been a part of the corporation's statutory organ or other managerial position or has exercised actual decision-making authority therein, or the care and diligence necessary for the prevention of the offence have not been observed in the operations of the corporation. A corporate liability may be imposed even if the offender cannot be identified or is otherwise left unpunished.

International crimes are not included in those specifically listed offences for which corporate criminal liability is provided. This form of liability is mainly applicable to economic and financial offences but also, among others, to participation in the activity of a criminal organization (CC 17:1a, 24) and to terrorist offences (Chapter 34a of the Criminal Code). The main sanction is a corporate fine of up to 850,000 euro.

Individual criminal responsibility and the liability of legal entities are applicable *cumulatively*. Indictments for both types of liability are tried independently. Imposing a corporate liability is possible even though the individual offender cannot be identified or for another reason is left unpunished.

### 3.3 Other Ways of Allocating Liability for Organizational Crime

The corporate criminal liability is not the only form of liability linked to *organizational crime*. The criminal liability within *legal persons* – i.e., the principles governing the allocation of individual criminal responsibility, especially the liability of the heads of business – was partly regulated in 1995 (Act No. 578/1995), when special provisions on such liability were given for labour and environmental offences (CC 47:7; 48:7).<sup>10</sup>

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<sup>8</sup> As for the intention in Finnish criminal law, see J Matikkala, 'Nordic Intent' in K Nuotio (ed), *Festschrift in Honour of Raimo Lahti* (Forum Iuris 2007) 221–34.

<sup>9</sup> See, generally, M Tolvanen, 'Trust, Business Ethics and Crime Prevention – Corporate Criminal Liability in Finland' [2009] *Fudan Law Journal* 99.

<sup>10</sup> On the interaction between these two forms of liability, see in more detail, R Lahti, 'Über die strafrechtliche Verantwortung der juristischen Person und die Organ- und Vertreterhaftung in Finnland' in *Festschrift für Keiichi Yamanaka* (Duncker & Humblot 2017) 131–52.

A more general provision on the allocation of individual liability was included in the reformed chapter on attempt and complicity (CC 5:8: 'Acting on behalf of a legal person'). The guidance given in those provisions is rather vague: '[I]n the allocation of liability due consideration shall be given to the position of that person, the nature and extent of his duties and competence and also otherwise his participation in the arising and continuation of the situation that is contrary to law'. The provision in CC 5:8 is, however, clear when prescribing that the person who exercises actual decision-making power in the legal person (*faktischer Geschäftsführer*) is to be considered equal to the member of a statutory body or management of a corporation.

The allocation of individual criminal responsibility has in practice been the primary form of corporate complicity in relation to the criminal liability of the corporation itself. This state of affairs can be explained with the facts that corporate criminal liability is still a relatively young construction in Finland, and it covers fragmentarily the offences to which it is applicable. However, it is increasingly applied to economic and financial offences.

The practice in the allocation of individual criminal responsibility has been very much in line with the guiding principles of Corpus Juris 2000 as formulated in the follow-up study, Article 12.<sup>11</sup> For instance, in a recent precedent of the Supreme Court (*KKO 2016:58*), members of the board of directors of a potato flakes factory (limited company) were convicted of the impairment of the environment through gross negligence (CC 48:1), when the effluent from the factory's potato sludge had contaminated the environment. These directors had omitted their supervisory duties as members of the company's board and were therefore liable for their omission to prevent the contamination (in line with the provisions of CC 3:3.2 and CC 48:7). A factual division of labour between the managing director (having the main responsibility for the factory's operational activities) and the board members did not exclude the supervisory duty or the board members' liability for the consequence.

### 3.4 Further Developments

When re-codifying of the Finnish Criminal Code, the legislature was cautious in expanding the forms of preparation and participation. This caution is explained by the significance of the criminalization principles and the importance of the principles of legality and culpability. When a Norwegian scholar, Erling Johannes Husabø, critically assesses the new global rules on terrorism, he speaks about the tendencies of 'more "pre-activism" in criminal law' and 'more "subjectivism" in criminal law'.<sup>12</sup> The Finnish legislature has generally been reluctant to incorporate these ideas in the recodification of the criminal law, although the scope of criminalized dangerous behaviour (*Gefährdungsdelikte*) was enlarged in comparison with traditional criminal law.

A Danish scholar, Jørn Vestergaard, advised the Finnish law drafters to preserve its legal tradition in regulating criminal participation, because it 'is in accordance with important developments in terms of continuously elaborating a doctrine which stresses the principles of *lex certa* and of penal restraint'. In contrast to the Finnish (and German) type of regulation, Danish provisions on the liability for attempt and participation are 'rather brief and their scope is somewhat wide and indeterminate', and the Danish Criminal Code is based on an extreme variation of a 'unitary perpetratorship' (*Einheitstäterbegriff*): according to Danish Penal Code § 23, Sec. 1, '[a] statute on a criminal offence applies to anybody who by abetting, counselling or aiding, has participated in the action'.<sup>13</sup> Nevertheless, the Finnish legislature was also in the 2000s compelled

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<sup>11</sup> See M Delmas-Marty and JAE Vervaele (eds), *The Implementation of the Corpus Juris in the Member States* (Vol. I, Intersentia 2000) 189–210 (193).

<sup>12</sup> E J Husabø, 'The Implementation of New Rules on Terrorism through the Pillars of the European Union' in EJ Husabø and A Strandbakken (eds), *Harmonization of Criminal Law in Europe* (Intersentia 2005) 73–75.

<sup>13</sup> J Vestergaard, 'Criminal Participation in Danish Law' in R Lahti and K Nuotio (eds), *Criminal Law Theory in Transition* (Finnish Lawyers' Publishing Company 1992) 475–90 (490). See, generally, K Nuotio, 'Participation in Crime in Nordic Criminal Laws: Variations on a Theme' in J Husa, K Nuotio and H Pihlajamäki (eds), *Nordic Law – Between Tradition and Dynamism* (Intersentia 2007) 127–52.

to make exceptions due to Finland's international (or European) obligations in combating terrorism and organized crime.

The Parliamentary Committees took the Government Bills concerning participation in the activity of a criminal organization and terrorist offences under special scrutiny. These legislative proposals later led to the enacted law provisions in CC 17:1a (participation in the activity of a criminal organization) and CC 34a:2 and 4 (preparation of an offence to be committed with terrorist intent; promotion of the activity of a terrorist group). The role of the Constitutional Committee of the Parliament was and continues to be important in evaluating Government Bills from the point of view of constitutional and human rights law aspects.

The criminalization of participation in the activity of a criminal organization was regarded as a new area in Finnish criminal law. In this situation, it was not possible to resort to the traditional doctrine on complicity or to other established concepts of criminal law. Therefore, the principles of *lex certa* and of penal restraint were of great significance. The proposals in the Government Bills, which were based on the European Union (EU) Joint Action (participation in a criminal organization) and Framework Decision (terrorist offences) were revised in order to make these new participation provisions more foreseeable and to make them more equivalent to the traditional complicity doctrine (so that the liability for complicity should also, in these cases, be derivative). At the same time, the loyal implementation of those EU instruments was sought.<sup>14</sup> The statutory definition of the participation in the activity of an organized criminal group was revised in 2015 (Chapter 17, Section 1a of the Criminal Code, Act No. 564/2015).

The definition of a terrorist group is provided by Chapter 34a, Section 6 of the Criminal Code. The provisions on terrorist offences (Chapter 34a) were adopted due to the national implementation of the Framework Decision (FD) of the EU of 2002 by Act No. 13/2003. Accordingly, the definitions and the provisions in this new Chapter 34a of the Criminal Code are, on the whole, harmonized with the relevant FD. The definition in question reads as follows: 'A terrorist group refers to a structured group of at least three persons established over a period of time and acting in concert in order to commit offences referred to in CC 34a:1.'

It should be noted that, in Chapter 34a of the Criminal Code, terrorism as such has not been defined. Instead, the chapter defines the constituent elements of terrorist acts. As for the basic offence (CC 34a:1), there must be 'terrorist intent' as defined in CC 34a:6, and the offender's activity must be likely to cause serious harm to a State or an international organization, and his activity must fulfil the criteria of some of the common crimes listed in CC 34a:1.1. These kinds of terrorist offences can be regarded as exceptionally aggravated offences.

Because the pressure towards expanding criminal liability has originated from international and European (EU) obligations in combating terrorism and organized crime, critical voices have often been directed against the legitimacy of those tendencies. When expanding criminal liability, there is often too much reliance on the use of extensive criminalizations and the deterrent effects of severe punishments and too little reliance on research and the rational consideration of what kinds of measures are the most effective in crime prevention and what is needed in order to secure fair and humane criminal proceedings across state borders.<sup>15</sup>

#### 4. Forms of Complicity in 'Macro-delinquency' and the Role of International Criminal Courts

I start with some general comments on the differentiation of international criminal law and harmonizing the general principles of this specific area of law. This kind of diversification of various areas of law is reflected

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<sup>14</sup> Statements of the Constitutional Committee, No 10/2000 (concerning Government Bill No 183/1999) and No 48/2002 (concerning Government Bill No 188/2002).

<sup>15</sup> As to critical voices against certain features of the recent developments of criminal law, see eg R Lahti, 'Towards Internationalization and Europeanization of Criminal Policy and Criminal Justice' in E W Pływaczewski (ed), *Current Problems of the Penal Law and Criminology* (Wolters Kluwer Polska 2012) 365–79; R Lahti, 'Towards a Rational and Humane Criminal Policy' (2000) 1 *Journal of Scandinavian Studies in Criminology and Crime Prevention* 141; K Nuotio, 'On the Significance of Criminal Justice for a Europe "United in Diversity"' in K Nuotio (ed), *Europe in Search of 'Meaning and Purpose'* (University of Helsinki 2004) 171–211; S Melander, 'The Implementation of the EU-based Criminal Law Instruments in Finland' in M Hollán (ed), *Towards More Harmonised Criminal Law in the European Union* (Hungarian Academy of Sciences 2004) 119–41.

in the pluralism of general legal doctrines and in the need to develop a more dynamic conceptual and systematic thinking in order to control many parallel legal regulations and the diversity of the regulated phenomena.<sup>16</sup> As for international criminal law, certain general principles have their doctrinal roots in this area: in particular, the irrelevance of official capacity, the responsibility of commanders and other superiors and superior orders. Complicity in international criminal law and, in particular, corporate complicity is a complex doctrine in transition.

Already, the comparison between the Statutes of *ad hoc* Tribunals International Criminal Tribunal for Former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR), on one hand, and the Rome Statute of the International Criminal Court (ICC), on the other, indicates changes in the provisions concerning superior responsibility and superior orders. Even more attention should be paid to those general principles which are for the first time regulated in the ICC Statute, such as the provisions on individual criminal responsibility (Article 25) as well as on the mental element (Article 30) and on mistake of fact and mistake of law (Article 32). Following Mireille Delmas-Marty's theoretical concepts, there may be questions about the extent to which the elaboration of these principles of international criminal law has been conducted through *hybridization*, i.e., by combining and fusing elements from both common law and continental law systems to qualitative different outputs; another question is the extent to which the implementation of those principles furthers the *harmonization* of national criminal laws.<sup>17</sup>

*Individual criminal responsibility* as such has been a generally recognised principle of international criminal law since the judgements of the International Military Tribunal. Articles 25(3) and 28 of the ICC Statute define the scope of individual criminal responsibility, covering the basic rules and the rules expanding attribution. An important question is how the characteristics of international criminal law to create liability for acts committed in a collective context and in a systematic manner can be adjusted to the principles of individual responsibility and culpability. So, the attribution of criminality for such international crimes as defined in Articles 5–8 of the ICC Statute ('macro-delinquency') has distinguishing features in comparison with the individual criminal liability for 'ordinary' offences according to domestic criminal laws: '[T]he individual's own contribution to the harmful result is not always readily apparent.'<sup>18</sup>

Subparagraph (d) of Article 25(3) extends the liability for *contributions to a collective crime* or its attempt in such a way which deviates from the civil law (Romano-Germanic) tradition when criminalizing participation in ordinary offences. It is noteworthy that this liability form is not fully in line with the common-law concept of 'conspiracy' but presents a compromise formulation which was also included in a similar provision in the anti-terrorism convention<sup>19</sup>.

A comparison between Article 7 (1) of the ICTY Statute and Article 25 (3) of the ICC Statute shows a clear difference: While the former provides a vague and general formulation of perpetration and various models of participation, the latter one is quite differentiated, distinguishing committing (solitary perpetration, co-perpetration and intermediary perpetration), instigating, aiding, otherwise supporting, and inciting a crime. Nevertheless, the provision of the ICC Statute has also proven to be unclear and contested. For instance, the extent to which the responsibility of a party to crime is dependent on the principal perpetrator; should the regulation be classified as representing a 'unitary perpetration model' instead of a 'differential participation model'? It was also questioned whether the doctrine of a *joint criminal enterprise*, which has been applied in

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<sup>16</sup> See, generally, R Lahti, 'Towards Harmonization of the General Principles of International Criminal Law' in *International Criminal Law: Quo Vadis?* (Association Internationale de Droit Pénal, Ères 2004) 345–49; K Nuotio, 'Transforming International Law and Obligations into Finnish Criminal Legislation' (1999) 10 Finnish Yearbook of International Law 325, 346; M Delmas-Marty, *Towards a Truly Common Law. Europe as a Laboratory for Legal Pluralism* (Cambridge University Press 2002); M Delmas-Marty, 'The ICC and the Interaction of International and National Legal Systems' in A Cassese, P Gaeta and JRWD Jones (eds), *The Rome Statute and the International Criminal Court: A Commentary* (vol II, Oxford University Press 2002) 1915–29.

<sup>17</sup> See Delmas-Marty, *Commentary II* (n 16) 1923–29.

<sup>18</sup> A citation from K Ambos in O Triffterer (ed), *Commentary on the Rome Statute* (Nomos 1999), Article 25, margin no 3. See, in detail, K Ambos, *Treatise on International Criminal Law. Vol. I: Foundations and General Part* (Oxford University Press 2013), ch IV. See also A Nollkaemper and H van der Wilt (eds), *System Criminality in International Law* (Cambridge University Press 2009).

<sup>19</sup> See International Convention for the Suppression of Terrorist Bombings (adopted 9 January 1998) UNGA A/RES/52/164, annex, Article 2(3)(c).

the ad hoc tribunal since the *Tadić Appeals Chamber Judgement (IT-94-1-A, 15 July 1999)*,<sup>20</sup> would be a legitimate general concept of international criminal law or whether new concepts of co-perpetration and other forms of participation would be developed in the practice of the ICC. It is interesting that the concept of *indirect perpetration* or *perpetration-by-means* has received a dominant position in the practice of the ICC and more generally in the legal doctrine.<sup>21</sup> A critical discussion on the subject has produced several monographs adding to the recent legal literature.<sup>22</sup>

There have been cogent reasons, based on the *lex certa* principle and the principle to culpability (*mens rea*), to limit the scope of the concept of a joint criminal enterprise. Nevertheless, the doctrine of co-perpetration needs further clarification. From a Finnish point of view, the theory of indirect perpetration by means of control over an organized structure should be complemented by other aspects of drawing a line between co-perpetration and other forms of participation and superior responsibility.<sup>23</sup> Careful note should also be taken of the recommendation of the AIDP resolution in 2009,<sup>24</sup> which calls upon the International Tribunals to harmonize their application of general notions of perpetration and participation in order to develop a coherent body of international criminal law.

A general regulation on the criminal *responsibility for omission* (commission by omission) was not adopted in the ICC Statute, although it was proposed during the preparatory work. In this respect, the ICC Statute did not follow the legislative trend of the recent reforms of Continental criminal laws (for instance, that of the Finnish Criminal Code<sup>25</sup>).

Nevertheless, the criminal liability for omission is recognized in Article 28 concerning *superior responsibility*. The responsibility of commanders and other superiors is based on customary international law, but the broad concept as adopted in this provision can be criticized. For instance, it is questionable to draw a parallel between the cases of knowledge and negligent ignorance of impending offences.<sup>26</sup> The solution of the German Code of Crimes against International Law in 2002, as well as of the amendment of the Finnish Criminal Code in 2008 to regulate the superior responsibility in separate provisions might serve as models for how to clarify and differentiate the contents of this general principle.<sup>27</sup>

## 5. Summarizing Observations on the Corporate Complicity From a Finnish Point of View

As described above, there is, so far, no court case in Finland in which an entrepreneur or a business corporation were involved in international crimes. Corporate criminal liability, which is adopted in Finland,

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<sup>20</sup> The Appeals Chamber (paras 185ff) defined the forms of joint criminal enterprise in the following way: (i) the 'basic' form includes cases where all participants, acting pursuant to a common purpose, share the same criminal intent and act to give effect to that intent; (ii) the second category is essentially similar to the first one, but is characterized by the 'systemic' nature of the crimes committed pursuant to the joint criminal enterprise, in the sense that it implies the existence of 'an organized system of ill-treatment'; (iii) the third and most controversial category, known as the 'extended' form of joint criminal enterprise, concerns cases where all participants share a common intention to carry out particular criminal acts and where the principal offender commits an act which falls outside of the intended joint criminal enterprise but which was nevertheless a 'natural and foreseeable consequence' of effecting the agreed joint criminal enterprise. See in more detail, eg, N Jain, *Perpetrators and Accessories in International Criminal Law* (Hart Publishing 2014), chs 2.II, 3, 4 and 11.

<sup>21</sup> On the rich legal literature see, eg, a special issue of the Journal of International Criminal Justice (2011), Vol 9, No 1, which includes the papers presented at a symposium on 'indirect perpetration by means of control over an organized power structure'. See also its Foreword by G Werle and B Burghardt.

<sup>22</sup> See, in particular, E van Sliedregt, *Individual Criminal Responsibility in International Law* (Oxford University Press 2012); Jain (n 20); M Aksenova, *Complicity in International Criminal Law* (Hart Publishing 2016).

<sup>23</sup> As for instance, Thomas Weigend points out in his article 'Perpetration through an Organization' (2011) 9 JICJ 91, the existence of an organization controlled by the perpetrator may be no more than one factor relevant for the distinction.

<sup>24</sup> See the Resolution of the XVIII AIDP International Congress of Penal Law (Istanbul, Turkey, 20–27 September 2009), Section I (The Expanding Forms of Preparation and Participation). On the Resolutions of the Congress, see *Revue Internationale de Droit Pénal*, Vol 80, Nos 3–4/2009.

<sup>25</sup> See Section 3 (2), Chapter 3 of the Criminal Code.

<sup>26</sup> See further eg K Ambos, 'Superior Responsibility' in Cassese, Gaeta and Jones (eds), *Commentary*, Vol II (n 16) 823-72; K Ambos, *Treatise on International Criminal Law*, I (n 18) ch VC.

<sup>27</sup> As to the German legislation, see G Werle and F Jessberger, 'International Criminal Justice is Coming Home: The New German Code of Crimes against International Law' (2002) 13 Criminal Law Forum 191, 204.



is not extended to cover international crimes (*in sensu stricto*). However, the general principles (regulated in the Criminal Code) on complicity and on the liability of the heads of business are applicable to business involvement in international crimes in a similar way as to other crimes. The same is true as for the general prerequisites of criminal liability and the grounds for exemption from liability (see below *Appendix 2*). The Finnish examples from court practice, which were explained above, concern economic and financial crimes. Similar application of the general principles can be expected in relation to business involvement in international crimes.

In her recent monograph, Marina Aksenova shows that the *ad hoc* tribunals and hybrid courts applying international criminal law have adopted their own approaches to the modes of participation. Even within one institution, the legal standards may differ from case to case. An illustrative example of this variation in the court practice is the question of whether the requirement of 'specific direction' should be an element of the *actus reus* of aiding and abetting.<sup>28</sup> (As mentioned above, Finnish criminal law does not require such an element.)

Harmonizing the practices of the international criminal courts in assessing the modes of participation is most desirable. A more extensive use of the general principles of law as a legal source, and an increased resort to comparative criminal law for recognizing those principles, could help in reaching that objective.

#### Selected literature

Aksenova, M, *Complicity in International Criminal Law* (Hart Publishing 2016).

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<sup>28</sup> See Aksenova (n 22) 113–31 (especially pp 114–15) with references.

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